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IN THE

Supreme Court of the United States

October Term, 1965.

No. 1013

BOY J. SMITH, Successor Trustee, et al.,
JOSEPH J. DROBNICK, MARK J. DROBNICK,
Petitioners,

vs.

THE DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF THE STATE OF ILLINOIS ETC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT AND TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago 1, Illinois (FI 6-2000),
Attorney for Respondents.

HAROLD G. ANDREWS
DONALD T. MORRISON
Special Assistant Attorneys General,
Of Counsel

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The respondent, Department of Public Works and Buildings of the State of Illinois, respectfully prays that a writ of certioari, to review the judgment of the Illinois Appellate Court, Second District, and the Order of the Supreme

Court of Illinois denying petitioner's petition for leave to appeal, be denied.

OPINIONS BELOW.

The opinion of the Illinois Appellate Court, Second District, is reported in 61 Ill. App. 2d, 301, and is appended to Appendix "A" in full in this opinion. A petition filed with the Illinois Supreme Court requesting leave to appeal was denied, without opinion, and is appended to the petition as Appendix "B". Both Appendix "A" and "B" correctly state the opinion of the Illinois Appellate Court, Second District, and the Order of the Illinois Supreme Court denying petition for leave to appeal.

JURISDICTION.

The jurisdictional requisites are not adequately set forth in the petition. The petitioner seeks to invoke jurisdiction under 28 USC 1257(3); 28 USC 1358; and 28 USC 1331.

Concerning 28 USC 1257(3), the validity of a treaty or statute of the United States is not drawn in question, nor is the validity of the State statute drawn in question, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, nor is there any title, right, privilege or immunity that is specifically set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under the United States, that can be appropriately claimed.

Concerning 28 USC 1358, this case is not a federal condemnation proceeding, nor was the condemnation of the subject real estate for the use of the United States or its Departments or agencies, and this section is not applicable to the jurisdictional requisites of this Court governing review in writ of certiorari.

Concerning 28 USC 1331, this section deals with the original jurisdiction of Federal District Courts and is not applicable to the jurisdictional requisites of this Court governing review on writ of certiorari from the state court proceedings.

Further, petitioner's statement that the matter in controversy exceeds the jurisdictional amount under Section 1331 has no application herein and does not invoke jurisdiction of this Court.

Finally, no federal question of substance was raised in the State court, timely or properly, so as to give the Supreme Court of the United States jurisdiction on writ of certiorari, nor as provided by Rule 19 of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED.

Will the Supreme Court of the United States take jurisdiction on a writ of certiorari and rule on the propriety of the application by the condemnor of the "Market value" rule to property being taken in a State court condemnation proceeding, which issue has heretofore been passed upon by the reviewing courts of the State?

STATUTE AND REGULATION INVOLVED.

The petition fails to set forth any appropriate statute, regulation, constitutional provision, treaty or ordinance, and merely refers to the Fourteenth Amendment of the Federal Constitution in general terms.

STATEMENT OF THE CASE.

Petitioner's reference to the amount of the preliminary finding of just compensation is not material, insofar as Chapter 47, Section 2.2(d), Ill. Rev. Stats., 1965, provides:

> Such preliminary finding of just compensation, and any deposit made or security provided pursuant thereto, shall not be evidence in the further proceedings to ascertain finally the just compensation to be paid, and shall not be disclosed in any manner to a jury impaneled in such proceedings; and if appraisers have been appointed as herein authorized, their report shall not be evidence in such further proceedings, but the appraisers may be called as witnesses by the parties to the proceedings.

Further, Chapter 47, Section 2.5, Ill. Rev. Stats., 1965, provides:

> Neither the petitioner nor any party interested in the property, by taking any action authorized by Sections 2-1 to 2.4, inclusive, of this Act, shall be prejudiced in any way in contesting, in later stages of the proceeding, the amount to be finally ascertained to be just compensation.

Moreover, the law in Illinois holds that valuations made by appraisers in preliminary proceedings made for the purpose of insuring an adequate deposit for the protection of the property owner in connection with the immediate vesting of title cannot serve as a touchstone in measuring the adequacy of the verdict, nor as to provide a guaranteed minimum. (*Department of Public Works* v. *Christensen*, 25 Ill. 2d, 273, 276-277.)

Further, the subject highway improvement, is a state highway improvement notwithstanding that Illinois may be reimbursed by the federal government because this is a federal aid project. Petitioner's reference to federal funds, therefore, is not material herein.

REASONS FOR DENYING THE WRIT.

The jurisdictional requisites are not adequately set forth in the petition.

The issue in this case is the propriety of the application by condemnor of the "Market value" rule to property being taken in a State court condemnation proceeding, which issue has heretofore been passed upon by the reviewing courts of Illinois.

A claim that a State court condemnation proceeding has deprived an owner of property of just compensation and due process and that a constitutional right has been violated does not present a federal question where the State court had jurisdiction of the parties and subject matter and all questions presented have been raised in State courts and review had been accorded. (*Chance* v. *County Board of School Trustees of McHenry County, Illinois,* CA Ill. 1964, 332 Fed. 2d, 971.)

Nor does the fact that the State government may be reimbursed by the federal government for work done in connection with this State highway improvement have any application herein nor does it give rise to a federal question. Questions arising from the taking of property by condemnation for State purposes are matters for determination by State rather than federal courts and the contention that a land owner was deprived of his property without due processes of law is insufficient to invoke "federal question" jurisdiction of federal courts, even though the federal government is subsidizing the acquisition pro-

gram. (*Harrison-Halsted Community Group, Inc.* v. *Housing and Home Financing Agency,* C.A. Ill. 1962; 310 Fed. 2d, 99; Ceriorari denied, 83 S. Ct. 1297; 373 U. S. 914; 10 L. Ed. 2d, 414.)

Further, it is submitted that a federal question of substance is not presented by the petitioner and there has been no decision by a State court of a federal question of substance not heretofore determined by this court or decided in a way probably not in accord with applicable decisions of this Court, as set forth by Rule 19(a) of the Rules of the Supreme Court of the United States.

The principal case cited by the petitioner, *Kimball Laundry Co.* v. *U. S.,* 338 U. S. 1, is easily distinguished and has no application and fails to demonstrate any conflict of decisions by this court. The Kimball Laundry case involved condemnation proceedings by the United States to condemn the temporary use of the laundry wherein the laundry was required to suspend service to its regular customers and which, under the circumstances, required compensation for the temporary taking from year to year. Under such circumstances the Supreme Court simply recognized that short-term takings of property might entail considerations not present where complete title had been taken, and that rules developed where the owner's interest in the property has been irrevocably severed should not be forced to fit the more complex consequences of a piecemeal taking of successive short-term interests, since such taking may involve compensable elements that in the nature of things are not present where the whole is taken.

Similarly, the three Illinois cases cited by petitioner are easily distinguished. They have no application herein and fail to demonstrate any conflict of decisions.

Further, as to the particular question, the argument advanced by petitioner is unreasonable and improper.

The ten foot strip of land taken in this proceeding was burdened with an old "Planter" easement for landscaping purposes running to the condemnor. In valuing the part taken condemnor's witnesses testified that they considered this easement and its effect on the value of the land.

The petitioners herein argue that such restrictions place the lands taken in the "Special use" category, and therefore the market value test would not apply. The argument is specious.

Certain classes of property, such as cemeteries and railway stations, are not commonly bought and sold in the market place. In such cases Illinois law then permits measures of value other than the familiar fair cash market value test, such as cost, amount of business done, or intrinsic value. (*City* v. *Farwell,* 286 Ill. 415.) Where property falls in this category, the market value test is not necessarily excluded, but the restrictions on the admissions of other kinds of evidence of value are relaxed. (*Ill. Cities Water Co.* v. *City of Mt. Vernon,* 11 Ill. 2d, 547; *Sanitary Dist.* v. *P. FT. W. & C. Ry. Co.,* 216 Ill. 575.)

Almost all real estate is burdened with easements for roads, sidewalks, utilities or other similar purposes, with zoning restrictions, with building lines and restrictions and other governmental and quasi-governmental restrictions, controls and permissive uses. Illinois has consistently applied the market value test, as distinguished from the value to the owner for his particular purposes, or its value to the condemnor for some particular use. The only exception to the rule is the so-called "special use" property which, because of *unique improvements,* give it special

capabilities which make it unmarketable, such as a church, school or railroad terminal. (*Peo. Gas Light & Coke Co.* v. *Buckles,* 24 Ill. 2d, 520, 532.)

The subject property in the case at bar is not "special use" property because it has *no unique improvements* which give it *special capabilities* which in turn make it unmarketable. It was, for the most part, ordinary vacant land. All of the part taken was vacant. If this property is said to be in the "Special use" category because of a "Planter" easement over the front ten feet, it would lead to the irrational conclusion that all property so burdened, even as to a small part, with any easement or restriction of record is "Special use" property. If such were the case we would have little, if any, use for the market value test in eminent domain proceedings.

Petitioner fails to cite any decision of this Court, or any other court, which is in conflict with the decision sought to be reviewed. The question herein is hardly of sufficient importance to be reviewed by this Court, and such matters are not of general concern, but are by their nature peculiar to the factual situations presented in the individual cases.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
Suite 900, 160 North La Salle Street,
Chicago, Illinois 60601 (FInancial 6-2000,
Attorney for Respondents.

HAROLD G. ANDREWS,
DONALD T. MORRISON,
Special Assistant Attorneys General,
Of Counsel.